IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE CRIMINAL JURISDICTION

CRIMINAL APPEAL NO.938 OF 2001

(through jail)

1.Jaggu @ Jaylal Bisun Mahanti.. Appellants

2.Prem @ Rameshwar Zhumru Paswan (Orig.Accd nos. 1 & 2)

versus

State of Maharashtra ... Respondent

Mr.Irfan Sait,Advocate (Appointed) for Appellants

Ms.U.V.Kejriwal, A.P.P.for Respondent

CORAM : J.N.PATEL AND SMT.ROSHAN DALVI, JJ

DATED : 7th August, 2006

ORAL ORDER :

1. The appellants came to be tried by the Ad-hoc Additional Sessions Judge, Thane in Sessions Case No.51 of 2000 on a charge that they had committed the murder of one Neelam Muralilal Singhal by

assaulting her with knife in furtherance of their common intention and thereby committed offence punishable under section 302 read with section 34 of the I.P.C. They were further charged of having committed robbery by taking gold ornaments worth Rs.1,00,000/- and cash of Rs.55,000/- from her person and thereby committed offence under section 394 read with section 34 IPC. The learned trial Court by its judgment and order dated 9th August, 2001 found the appellants/accused guilty on both the counts and convicted and sentenced them to suffer imprisonment for life and also imposed a fine of Rs.25,000/- on each one of them, in default to suffer imprisonment for a period of three years. Out of the fine, if recovered it was directed that a sum of Rs.50,000/- will be paid to the complainant Anupam and so also the stolen property will be given to the complainant after the period of appeal is over. This judgment and order of conviction and sentence is the subject matter of challenge in this appeal.

2. Before we could proceed with hearing of the matter, our attention was drawn by Mr.Irfan Sait (appointed) that the appellants/accused have been tried before the trial Court without being defended

by an Advocate and inspite of the appellants/accused having made such a request to the trial Court, they were denied the assistance of an Advocate to defend them and the trial Court proceeded to record the evidence in the matter and called upon the appellants/accused to cross-examine the witnesses which has not only resulted in miscarriage of justice but, also amounts to denial of the fundamental rights available to an accused to be defended in a criminal trial which is enshrined in Article 21 of the Constitution of India read with Article 39A of the Directive Principles of State Policy and section 304 of the Cr.P.C. It is therefore, contended that trial of the accused stands vitiated and they deserve to be acquitted of the charges and be ordered to be released forthwith.

3. Learned counsel appearing for the appellants further submitted that the appellants have agitated the issue of being denied the assistance of an Advocate to defend them during the trial even in the memo of appeal presented before this Court.

4. The learned counsel also took us through the records and proceedings of the trial Court and

particularly the roznama of the proceedings.

5. Our attention was drawn to the roznama dated 2nd July, 2001 which records as under :

> " The accused produced from jail. The A.P.P. present. Accused asked for counsel at the cost of government. Accused are denied."

It appears that thereafter the Court proceeded to record the deposition of witness no.1 for the prosecution i.e. the complainant Anubhav Sinha and other witnesses who were present. The matter was taken from day to day till the trial was concluded and the judgment and sentence was pronounced.

6. Learned counsel has also pointed out to us from the evidence on record that the witnesses who have been examined by the prosecution were cross examined by one of the appellant/accused in person as they were left with no choice but to defend themselves as they were denied the assistance of a lawyer.

7. Ms.Kejriwal, learned A.P.P. submitted that it is not a case where the appellants/accused did not have an opportunity to engage an Advocate of their choice and as can be seen from the roznama though

the trial was pending in Court from 10th February, 2000 upon committed to the Court of Sessions on 25th January, 2000, the appellants/accused did not engage any advocate though they were repeatedly produced before the Court and were so informed as can be seen from the roznama dated 10th August 2000 onwards when the matter was taken up by the trial Court for framing charges. The next date which was given to enable the accused to engage an Advocate was on 28th January, 2000. On that date also, the roznama records " Accused have not yet engaged an Advocate." Therefore, the appeal was adjourned to 12th September, 2000. It was required to be adjourned again as the accused had not engaged any Advocate and therefore it was fixed on 27th September, 2000. On this date, the accused were not produced before the Court. It was adjourned to 11th October, 2000. On that day, they were produced. But, thereafter as on 2nd November, 2000 the Presiding Officer was on leave it came to be adjourned to 21st November, 2000. At that time also, the vakilpatra was not filed indicates that they had not engaged any Advocate till then. Thereafter, though the matter has been adjourned from time to time, they failed to engage any advocate. In these circumstances, the Court was

left with no other choice but to proceed with the matter. As the appellants/accused did not move the Court for seeking an Advocate from the legal aid panel and therefore the appellants/accused having taken a decision not to engage advocate to defend them and to participate in the trial and decided to cross-examine the witnesses in person. Therefore, it cannot be said that the trial stands vitiated as there was no fault on the part of the State in not providing them with any Advocate as it was not asked for by the appellants though they were facing serious charge for the offences of robbery and murder. Therefore, it cannot be said that the trial stands vitiated and the judgment and conviction of the appellants/accused which is a result of a full-fledged trial in which the appellants/accused has availed the opportunity of cross-examining the witnesses does not deserves to be quashed and set aside, on this ground.

8. In our view, denial of opportunity to the appellants/accused to be defended by an Advocate of their choice or if they were not capable of doing so,or failure on the part of the State to assign an Advocate to defend them at the cost of the State have deprived them of their right to be defended by

an Advocate particularly when they were facing serious charges of having committed robbery and murder has resulted in miscarriage of justice.

9. The contention of the learned A.P.P. that the appellants/accused inspite of being given several opportunities failed to appoint an Advocate to defend them at the trial and it is only at the stage when the trial was taken up for examination of the witnesses that they appeared to have made a oral request to the Court seeking appointment of an Advocate for them which was turned down cannot be said to have fullfilled the requirement of section 304 of Cr.P.C. The right of an accused particularly those who are unable to engage an Advocate of their own stands crystallised by a catena of decisions of the Supreme Court as well as this Court and we may not refer to all the decisions on the issue in order to arrive at a conclusion that this is a fit case where the appellants/accused deserves an opportunity to be defended at the trial by appointing an Advocate for them from the legal aid panel. In the decision rendered by the Supreme Court in the case of **Sukhdas and anr vs Union Territory of Arunachal Pradesh** AIR 1986 SC 991 the three Judge bench of

the Supreme Court observed thus :

> " Free legal assistance at State cost is a fundamental right of a person accused of an offence which may involve jeopardy to his life or personal liberty. This fundamental right is implicit in the requirement of reasonable, fair and just procedure prescribed by Art.21. The exercise of this fundamental right is not conditional upon the accused applying for free legal assistance so that if he does not make an application for free legal assistance the trial may lawfully proceed without adequate legal representation being afforded to him. On the other hand, the Magistrate or the Sessions Judge before whom, the accused appears is under an obigation to inform the accused that if he is unable to engage the services of a lawyer on account of poverty or indigence, he is entitled to obtain free legal services at the cost of the State. The conviction reached without informing the accused that they were entitled to free legal assistance and inquiring from them whether they wanted a lawyer to be provided to them at State cost which resulted in the accused remaining unrepresented by a lawyer in the trial is clearly a violation of the fundamental right of the accused under Art. 21 and the trial must be held to be vitiated on account of a fatal constitution infirmity. "

10. This view has been consistently followed by almost all the High Courts in the country including our High Court and one latest decision of our Court relates to Confirmation Case No. 4 of 2005 **(State of Maharashtra vs.Najir Ahmad Mohd Khan @ Mohd Najir Mohd)** where this Court by its judgment dated 15th February, 2006 opined that the appellants/accused in the said case was deprived of

a fair trial as the advocate who was appointed as defence counsel for the accused withdrew and stopped appearing in the trial due to which his right to defend was seriously effected before the trial Court and the trial Court proceeded with the trial without appointing another Advocate in his place.

11. We do not agree with the contention of the learned A.P.P. that there has been no miscarriage of justice in the matter but, what we find that though the appellants/accused have cross-examined the witnesses, it was out of no choice left to them and further they were in judicial custody during trial though the last roznama in which it is reflected that the accused sought for appointment of an Advocate from the Court and was denied does not spell out the reason for such a denial. It cannot be said that the appellants/accused were interested in delaying the trial or avoiding the course of justice by not engaging an Advocate or were capable of engaging an Advocate and intentionally did not do so and were not qualified for being provided with an Advocate from the legal aid panel, to defend them.

12. Accused persons in this case were put on trial for having committed offences of robbery and murder which if established and proved against them would invite capital punishment. Therefore they were entitled to be offered legal aid. Breach of those safeguards of fair trial would invalidate the trial and conviction, even if the accused did not ask for legal aid.

13. In the aforesaid circumstances, we quash and set aside the judgment and order dated and remand the matter to the trial Court with a direction that the trial Court will appoint an Advocate from the legal aid panel to defend the accused and on such appointment being made, the Advocate would be given sufficient opportunity to prepare the case and seek necessary instructions from the accused persons in respect of their defence and related matters so as to facilitate him to defend them in the trial. In so far as the evidence which has already been recorded by the trial Court, we make it clear that we are remanding the matter only for the limited purpose of enabling the appellants/accused to cross-examine the witnesses by re-calling thosewho are available for cross-examination. In case of witnesses who have been examined by the prosecution

but, now are not available for cross-examination, the trial Court would deal with their evidence in accordance with the provisions of the Indian Evidence Act and would be free to take its own decision in the matter of appreciation of such evidence in accordance with law. On conclusion of recording of evidence the trial court will examine them afresh under section 313 Cr.P.C. and thereafter, the Court would hear the arguments of the learned counsel for the appellants/accused and the learned A.P.P. and proceed to deliver a judgment without being influenced by the fact that the appellants/accused have been already convicted and sentenced by the trial Court in the same case.

14. We expect that the trial Court would complete this exercise as expeditiously as possible and preferably conclude the trial as directed by us and in accordance with law within a period of six months from the date of communication of this order by the Registry of this Court. The Registrar (Judicial) to act upon our order without waiting for further directions in the matter.

15. The R and P be forthwith sent to the trial Court alongwith the articles received by the Court

if any.

16. The operative part of this order should also be communicated to the appellants/accused forthwith who shall continue to remain in judicial custody till conclusion of the trial.

17. Appeal stands disposed of accordingly.

(Smt.Roshan Dalvi, J) **(J.N.Patel, J)**